INDEX

332-621—69——1

CITATIONS

Cases:

Cases—Continued

Miscellaneous—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 517

THE NATIONAL BOARD OF THE YOUNG MEN'S CHRISTIAN ASSOCIATIONS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (J.A. 199a) is reported at 396 F. 2d 467.

JURISDICTION

The judgment of the Court of Claims was entered on June 14, 1968. The petition for a writ of certiorari was filed on September 12, 1968, and granted on November 25, 1968. The jurisdiction of this Court rests on 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the Fifth Amendment requires the United States to pay compensation for buildings

damaged further by rioters after the Army had driven them out of the buildings and was, then, forced to retreat into them in its defense of the buildings and the adjacent boundary.

2. Whether this case presents any reason to re-examine *United States* v. *Caltex*, 344 U.S. 149.

STATEMENT

Petitioners seek to recover from the United States the value of damage inflicted upon their buildings in the Panama Canal Zone by anti-American rioters. The buildings, which are situated directly on the border between the Canal Zone and the Republic of Panama, were only two of many private and government buildings and other property assaulted and damaged during four nights and days of rioting in January, 1964 (J.A. 91a–93a). Petitioners do not seek compensation for all the damage done to their buildings, but only for that which occurred after United States Army troops drove the rioters from them and then occupied them as part of their efforts to protect all property and persons in the Canal Zone, including these buildings, from the rioters.

The exhibits which served as stipulated facts for decision below (J.A. 21a) show that during late 1963 and the first days of 1964, the question of flying the Panamanian flag in the Canal Zone became the subject of growing tension between American residents of the Canal Zone and their Panamanian neighbors (J.A. 26a–34a). On the evening of January 9, groups of Panamanians attempted to fly the Panamanian flag within the Zone, first at Balboa, at the Pacific terminus;

and then at Cristobal, at the Atlantic end of the Canal (J.A. 34a ff., 47a). These groups returned in anger from the Canal Zone to the adjoining Panamanian cities of Panama City and Colon, respectively. As was true throughout the subsequent riots, news of the incidents was broadcast with some heat over local (Panamanian) radio stations and through local newspapers (J.A. 79a ff). Angry, rioting mobs of Panamanian citizens began to form along the border of the Canal Zone at Panama City and Colon, and to a lesser extent in the interior of the country (J.A. 94a). They sought to attack and burn anything identifiably American—business enterprises, official homes and residences, cars bearing Canal Zone license plates, and so on.

When it shortly appeared that local police would be unable to quell or contain the rioters, the Commander of the Armed Forces in the Canal Zone assumed responsibility (J.A. 200a–201a). In order to avoid further inflaming relations with the government of the Republic of Panama, he forbade any movement of troops out of the Canal Zone, and restricted them to using riot weapons, such as tear gas, except for a few instances in which use of firearms was specially authorized in an attempt to suppress sniping (J.A. 165a, 177a–178a). Thus, the troops were deployed on or as near the boundary as circumstances would permit, in confrontation with the major concentration of rioters. The riots persisted through January 13. Over $2,100,000 worth of private and public property in the Canal Zone, including that for which compensation is claimed in this case, was stolen, damaged, or destroyed during that time (J.A. 91a–93a; see also Hear-

332-621—69——2

ings on Public Works Appropriations, 1965, Senate Committee on Appropriations, 88th Cong., 2d Sess., Vol. 18, p. 1204).

Colon, at the Atlantic end of the Panama Canal, is an enclave in the Canal Zone, bounded on three sides by the Caribbean Sea and on the southwest, Canal side, by the Zone. The boundary is unmarked and unfenced, running from the sea up the center of Eleventh Street to its intersection with Bolivar Avenue and thence in a southeasterly direction along the center of Bolivar Avenue (J.A. 222a). As can be seen from the map in the Joint Appendix (*ibid.*), the portion of the Canal Zone behind this part of the boundary forms a salient jutting into the city. In this salient, abutting directly on the boundary streets, were the office and storage facilities of the Panama Canal Company (also referred to as the Commissary) and petitioners the Cristobal Masonic Temple and the Cristobal Y.M.C.A.

The Commander of the Army troops whose actions form the basis of the claims in this case stated, as part of the stipulated record (J.A. 158a ff.), that he and approximately 700 troops arrived in Cristobal at about 10:15 p.m. on the evening of January 9 under orders "to clear the rioters from the Canal Zone [and] seal the border * * *" (J.A. 159a). He found about 400 rioters in the vicinity of the three buildings of the salient, breaking their windows and apparently looting.[1] He sent one company of troops to clear this

[1] The Chief of Police described the scene at the Y.M.C.A. before the troops arrived as follows (J.A. 102a).

> When we entered the Y.M.C.A. it was a scene of utter destruction. All of the light fixtures—the globes were broken. The furniture was broken and strewn about the floor. The

area, and another company further down Bolivar Avenue. There were practically no rioters in this second area. "Most all of the rioters were operating in the three buildings located along the border in the Canal Zone which was the Commissary building, the Masonic Temple and the Y.M.C.A. where mass destruction was going on" (J.A. 160a). The troops were able to expel the rioters from the Zone, with some scuffling; the rioters remained along the Panamanian side of the border, throwing rocks, sticks, bottles, and other objects, and the troops took up positions in the street, along the boundary line.

By the early morning hours of the 10th, the hostile crowd around the salient had grown to 2,000 to 3,000 persons. Sniper fire and the throwing of Molotov cocktails became "quite heavy" (J.A. 163a). When a man was wounded, the troops were moved inside and to the rear of each of the buildings. By late morning the Y.M.C.A. was on fire; crowds of up to 600 roamed the streets in the vicinity of the salient throughout the day. On the next day, Molotov cocktails gutted the Commissary building; on January 12, they set the second floor of the Masonic building on fire. Ultimately, three soldiers were killed and others wounded by snipers; eighty-three more were injured by thrown objects (J.A. 170a). With the policy which had been set, however, the troops made no effort to cross the border to apprehend snipers or others but used teargas in an attempt to disperse crowds and push them back

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water fountain had been torn from the wall and was laying on the floor and the water was flowing out all over. A steel grille gate which surrounded the merchandise section was crushed to the floor and there was a large group estimated up to 100 people running all about the place breaking things and some were carrying merchandise out the front door.

behind the border; it was not until the afternoon of January 11 that selected personnel were authorized to fire at the snipers (J.A. 165a).

The fact sheet prepared by the General Counsel of the Army, also a part of the stipulated record (J.A. 95a ff.), contains a similar description of the events. It, too, indicates that the rioters were principally in and around the buildings of the salient when the troops arrived; that the troops at first took up positions on the boundary itself, in the centers of Eleventh Street and Bolivar Avenue; and then were forced to take positions in and behind the salient buildings, including petitioners', by the continuous barrage of Molotov cocktails, debris, and sniper fire. The troops maintained these positions as long as they could, to protect the property involved and to carry out their orders to clear and seal the Zone.

Petitioners subsequently filed administrative claims with the Army seeking compensation under 10 U.S.C. 2733 for the damage which occurred to their buildings after the Army had initially expelled the rioters; they disclaimed damages caused by the earlier rioting or by the troops in first clearing the Zone (Br. 16 n. 22). When these claims were denied (J.A. 12a–13a), petitioners filed this action in the Court of Claims (J.A. 2a). They characterized as a taking for "public use" the troops' retreat into and behind the buildings and subsequent defense from that vantage of the border and the buildings; and they sought "just compensation" under the Fifth Amendment on this basis. On cross-motions for summary judgment (J.A. 17a, 20a, 21a, 198a), a majority of the court rejected petitioners'

characterization of the stipulated facts; it found, instead, that the government had used the property temporarily, under the compulsion of military necessity in battle-like conditions, and consequently had no duty of compensation (J.A. 207a–208a). Judge Davis, dissenting, believed the troops had used the buildings "as a place of refuge and defense"; that the assaults by Panamanians on the buildings "came about because, and after, the United States troops had entered and occupied them * * * 'so as to expose that property particularly to enemy fire' "; and that, consequently, Fifth Amendment compensation must be paid for the damage the rioters thereafter inflicted on them (J.A. 215a–216a).

SUMMARY OF ARGUMENT

Petitioners argue this case as if the troops involved had especially chosen their buildings in particular as refuges where they could be safe from the rioting mob, and by doing so had drawn the rioters to a place where they otherwise would not have been and into acts which they otherwise would not have committed. We submit that this is an artifical view of the facts. The troops came to and defended the border area where petitioner's buildings were because that is where the rioters were. Because their authority was limited to the area within the Canal Zone and because they were not authorized to employ weapons as deadly as those the rioters were employing against them, they were required to take shelter if they were to continue to defend the Zone. They took shelter in all three buildings on the border where the rioters were; all three were subject to the rioters' attack. The damage

in this case was inflicted solely by hostile forces and only because the storm of battle passed over them and back again.

We argue in the first instance that property owners whom the government seeks to protect in the course of civil disturbances ought not be afforded priority in sharing whatever community funds are available to redress the damage done. Although in this case the calamity was not so great nor the government resources so slight that the government would be unable both to pay this claim and to carry out its other programs, the applicability of the constitutional requirement of just compensation to states and municipalities makes such a dilemma possible in the future. The problems of reconstruction which arise after a widespread calamity are not best solved by giving a priority of claim to those persons whose property a government seeks most directly to protect.

Moreover, no holding has indicated that the Fifth Amendment requires compensation for damages inflicted on private property as a result of government action where the government has acted under the compulsion of a public emergency. On the contrary, the established doctrine of "public necessity" recognizes the right of public officers to enter and use private property without need for compensation if they do so under the immediate compulsion of a community emergency which requires their action. This doctrine has been applied both in domestic cases directly involving the Fifth Amendment and in international cases applying common principles of justice. The only exception suggesting liability is an occasionally recog-

nized rule of international law, the so-called "target" doctrine, which awards damages if it is found that the troops of one country intentionally acted in the conduct of war particularly to expose the property of a resident alien to enemy fire. In all cases in which this doctrine has been applied, however, the military had selected the site in advance and thus could be said intentionally to have drawn the enemy's fire to that point. The theory is thus inapplicable on the facts of this case, since the troops here made no choice, but defended the boundary from every available, tenable location in the rioters' vicinity.

We agree with petitioners that there is no occasion to reexamine this Court's decision in *United States* v. *Caltex,* 344 U.S. 149. The only respect in which that decision is significant here is that it recognizes the public necessity doctrine. The possibly controversial holding of that case, that deliberate government destruction of property to deny its use to the enemy falls within the area of public necessity, is not an issue here; for here, the government was acting to protect, not to destroy, the property in question. Rather than constituting an extension of *Caltex,* this case falls squarely within that aspect of the public necessity doctrine which has been almost unanimously recognized by the cases and commentaries. As was stated by a member of the majority in *Burmah Oil Co.* v. *Lord Advocate,* [1964] 2 All Eng. Rep. 348, 394, "In respect of a house that has the misfortune to be in the centre of a battle field and is inevitably demolished * * *, it is clear, on the principles which have been almost unanimously set out, that the subject can have no claim."

ARGUMENT

I. THE ENTIRE RIOT MUST BE VIEWED AS A SINGLE TRANSACTION

Although argument to the facts would ordinarily be inappropriate in this Court, the case was decided below entirely upon the exhibits of record in this Court, which, with limited exceptions, are reproduced in the Joint Appendix. In many respects, the issues in this Court are not so much issues of principle as issues how the facts are to be characterized in light of generally agreed principles. Thus, as will appear *infra*, pp. 25–28 and n. 12, if the facts were as the dissent characterized them (J.A. 213a–216a), a case for government liability might have been made out. We therefore deem it appropriate to begin with a brief discussion of the characterization issue.

Petitioners' case depends on a view of the facts artificially limited both in time and in space. They argue that the troops' entry into their buildings in retreat from the mob constituted a discrete taking for public use; and that once the troops were in their buildings, their presence drew the mob to a spot where they might not otherwise have been and made the buildings a special target for attack. In doing so, they depict the riots as if they occurred only along the Bolivar Avenue boundary between Cristobal, Canal Zone and Colon, Panama, between Eleventh and Twelfth Streets, and after midnight of January 9. Implicitly, they assume that the troops had some choice as to the location from which they would defend the Zone's boundaries, buildings and property, and made a free or deliberate choice of petitioner's buildings in partic-

ular as suitable sites. They concede that the government is not liable for the damage the rioters did before the troops arrived, or even for the damage the troops did in expelling them, but insist that it is liable for the damage the rioters did after the troops had expelled them and were holding them at bay.

Properly viewed, however, the riots were a single transaction, which began early in the evening of January 9, in the absence of any troops. Although this case is concerned solely with what happened in Colon-Cristobal, the riots constituted a Zone-wide, even nationwide, anti-American upheaval which resulted in extensive damage to life and property throughout Panama and the Canal Zone. The rioters of Colon chose the site for their part in this upheaval, congregating from the start in and around all three buildings of the salient—the Commissary, the Masonic temple, and the Y.M.C.A.; the troops came to this spot because the rioters were there. They came under orders to seal the border and to protect and preserve Canal Zone property, including the buildings; their authority to expel rioters was limited by the border, which ran down the center of the streets on which the buildings stood, and by understandable restrictions on the weapons which they could employ. In the give and take of the riots, the troops first entered the buildings of the salient—all of them—and drove the rioters out, and then had to retreat back into and through the buildings—all of them—in their efforts to protect the Zone. There was a continuous "pitched battle" (J.A. 204a) around the salient, a battle not divided into parts in any significant way.

352-621—69——3

Petitioners' buildings were not isolated places freely or deliberately chosen because of their suitability for defense of the Zone. Together with the Commissary, which also was occupied, they marked the border of the salient where the rioters had been from the start. Once the rioters had been expelled, the troops could not have left the boundary without opening it to renewed incursions and these bordering buildings to further damage. Once the sniper fire and Molotov cocktails forced them to move back from the boundary itself, they had to occupy the buildings unless they were to leave the boundary entirely open at that point. They occupied all the buildings along the boundary where the rioters were, and all the buildings were subjected to the rioters' assault. Thus, the buildings were used and damaged only because the storm of battle passed over them and back again.[2] The damage was inflicted solely by the hostile forces; it was the presence of those forces that had drawn the troops to the salient and not *vice versa*.

II. PROPERTY OWNERS WHOM THE GOVERNMENT SEEKS TO PROTECT IN THE COURSE OF CIVIL DISTURBANCES OR PUBLIC CALAMITIES OUGHT NOT TO BE AFFORDED PRIORITY IN SHARING WHATEVER COMMUNITY FUNDS ARE AVAILABLE TO REDRESS THE DAMAGE DONE

Viewed strictly with reference to the equities involved, petitioners' claim that governmental bodies should compensate persons in their position for dam-

[2] The fact that after peace was restored (Pet. Br. 5) the Army required alterations in the buildings to minimize danger and damage from any subsequent rebellion has no bearing on this case. At most, it reflects a lesson learned from this encounter. The presence of command and observation posts in the Masonic temple simply reflects that, located as it is at the point of the salient, it was at the heart of this encounter.

age rioters do is unconvincing. Such damage may occur, as here, in the course of widespread, destructive riots. Doubtless, much of the destruction will be visited upon persons who have no claim that the government, by entering or even standing before their property, appropriated it to public use and invited attack. If required to act as an insurer of those it had sought most directly to protect, some communities may be rendered unable adequately to assist others harmed in the same calamity.

In the present case, of course, the calamity was not so great, nor are the government's resources so slight, that the government's ability both to pay this claim and to carry out necessary rehabilitation would be put in doubt if it were held liable. But since the Fifth Amendment's requirement of "just compensation" is applicable through the Fourteenth Amendment to the states, *e.g.*, *Fiske* v. *Kansas*, 274 U.S. 380, and through them to municipalities, it is not unreal to suppose that a ruling in petitioners' favor might raise a problem in the future. Cf. *Louisiana* v. *Mayor of New Orleans*, 109 U.S. 285; Note, *The Burmah Oil Affair*, 79 Harv. L. Rev. 614, 626. It would seem hard to distinguish from petitioner's the claim of a store-owner that a policeman guarding his store during urban riots made it a target for the Molotov cocktails that set it ablaze; or, claims from owners of cars behind which police crouched while working their way around a mob. Nor is it clear that one would wish officers engaged in emergency riot control to add to the factors they must consider the possible condemnation costs or rights involved in protecting one or another neighborhood or building, or of using one or another line of advance or retreat.

As we said in the context of war-time destruction,

> It is impossible not to regret the losses incurred by the respondents through no fault of their own. It is also true that if Congress chose, as a matter of grace, to reimburse American property owners for the relatively small amount of their property which was destroyed to deny it to the enemy during World War II, no serious financial consequences would ensue. However, the fact that other nations have had occasion to apply this military policy on a large scale warns that the Fifth Amendment should not be construed to place upon the United States a rigid obligation to pay which, under certain conditions, might create impossible financial burdens for the Government.
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> Given the destructiveness of any future warfare, responsible governments need to retain freedom of action to deal with great devastation in terms of over-all reconstruction needs and priorities. In such circumstances, for example, much battle damage, admittedly non-compensable under the Fifth Amendment, might require priority for restoration out of public funds over damage as to which the decision below imposes an absolute obligation upon the United States. The prime purpose of such a reconstruction program would be to insure the replacement of essential facilities, rather than to put cash in the pockets of former property owners. Thus, Section 104(c) of the Philippine Rehabilitation Act of 1946, 60 Stat. 128, 130, requires that payments made under that Act be used to replace or repair the damaged property or, where that is impossible, "reinvested in such manner as will further the rehabilitation or

economic development of the Philippines."[3] Such problems of reconstruction after destructive warfare cannot be solved by creating rigid legal rules for the payment of compensation for particular types of war damage.[4]

In our view, the same reasoning should control this case, where riot damage is at issue.

It is clear that communities were never held liable for riot-inflicted damage at common law; nor is there any instance of such liability being imposed as a matter of constitutional necessity. "[R]emedies against municipal bodies for damages caused by mobs, or other violators of law unconnected with the municipal government, are purely matters of legislative policy, depending on positive law, which may at any time be repealed or modified * * *." *Louisiana* v. *Mayor of New Orleans,* 109 U.S. 285, 291 (Bradley, J., concurring). Although statutes making municipalities liable for *all* riot damage done to citizens were not uncommon, the policy behind these statutes was to encour-

[3] See also Section 20, Part I, War Damage Act, 1943, 6 & 7 Geo. VI, c. 21:

> The Treasury shall give directions to be observed by the Commission for securing that the provisions of this Part of this Act relating to the making of payments in respect of war damage shall be executed in conformity with the public interest as respects town and country planning, the provision of housing accommodation, the development of industries and services and of agriculture, the preservation of amenities, the consumption of supplies of building materials for the time being available, the building requirements of persons engaged in work of public importance, and such other matters as may be prescribed.

[4] Brief for the United States in *United States* v. *Caltex*, No. 16, O.T. 1952, pp. 18–19.

age municipalities to form police brigades and take other measures which might ultimately lessen the incidence and cost of riot damage. *City of Chicago* v. *Sturges*, 222 U.S. 313, 323; see also *Wells Fargo & Co.* v. *Mayor and Alderman of Jersey City*, 207 Fed. 871 (D. N.J.), affirmed, 219 Fed. 699 (C.A. 3), certiorari denied, 239 U.S. 650; *Mr. Paint Shop, Inc.* v. *City of Rochester*, 254 N.Y.S. 2d 728; *Hart's Food Stores, Inc.* v. *City of Rochester*, 255 N.Y.S. 2d 390; *Finkelstein* v. *City of New York*, 47 N.Y.S. 2d 156, affirmed, 53 N.Y.S. 2d 465, 269 App. Div. 662, affirmed 295 N.Y. 730, 65 N.E. 2d 432. Nichols, *The Law of Eminent Domain*, Sec. 1.43[3] (3d ed.). The principle of liability which petitioners urge, however, is exactly the contrary; if acknowledged, it would tend to promote the claims of those persons who did receive police protection during riots over the claims of those who did not. While the statutes make the community's potential liability an incentive for it to protect all citizens, the ruling petitioners urge might create incentive not to.

III. FIFTH AMENDMENT COMPENSATION FOR DAMAGE INFLICTED ON PRIVATE PROPERTY AS A RESULT OF GOVERNMENT ACTS IS NOT DUE WHERE THE GOVERNMENT ACTS WITHOUT DELIBERATION, BUT UNDER THE COMPULSION OF A PUBLIC EMERGENCY.

Of course, the considerations just discussed cannot govern if the Fifth Amendment requires that the actions of the troops in protecting the Canal Zone generally, and petitioners' buildings and the Commissary in particular, be considered a taking for public use for which compensation must be paid. But we believe

no such holding is required. The facts of this case do not bring it within the established Fifth Amendment categories. To the contrary, the facts fall readily into the "public necessity" exception, regarding which there is general agreement that compensation need not be paid.

A. THIS CASE DOES NOT PRESENT A COMPENSABLE TAKING FOR PUBLIC USE UNDER THIS COURT'S PRIOR CASES

Under the principles of eminent domain, a taking requires an intention, express or implicit, to impose a servitude. A servitude is not implied and imposed by a single or rare temporary use. *Peabody* v. *United States,* 231 U.S. 530; *Portsmouth Harbor Land & Hotel Co.* v. *United States,* 250 U.S. 1; *Sanguinetti* v. *United States,* 264 U.S. 146, 149–150. Unintended, consequential damages incident to a public undertaking must be borne without any compensation. *Transportation Co.* v. *Chicago,* 99 U.S. 635, 642; *Mitchell* v. *United States,* 267 U.S. 341, 345; *Gibson* v. *United States,* 166 U.S. 269; *Bedford* v. *United States,* 192 U.S. 217, 224; *Jackson* v. *United States,* 230 U.S. 1, 23.

Petitioners set out at length various situations resembling one or another element of the present fact situation in which this Court has found a constitutional taking. But while the government was required to pay compensation for its temporary occupation of a coal mine, *United States* v. *Pewee Coal Co.,* 341 U.S. 114, and of leaseholds, *United States* v. *Petty Motor Co.,* 327 U.S. 372; *United States* v. *General Motors Corp.,* 323 U.S. 373, it was clear in each of these cases that the government intended to assert complete do-

minion over the property taken, for its sole benefit and adverse to the owners' interests, over a substantial period of time. Where the government was held to have taken easements by its use of planes, *United States* v. *Causby*, 328 U.S. 256, and shore guns, *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U.S. 327, this Court stressed the continuing, as opposed to occasional, character of the use. Compare *Peabody* v. *United States* and the first *Portsmouth Harbor Land & Hotel* case, *supra* p. 17. And, although petitioners assert that "intent to take is not a crucial factor," Pet. Br. 15, in the cases they cite the taking has been an inevitable consequence of the government's action—as where rising waters behind a dam eroded a riparian owner's land, *United States* v. *Dickinson*, 331 U.S. 745—so that a general, if not specific, intent to take has been present; and, in each of these cases, the use, again, has been of a continuous character,[5] entirely adverse to the plaintiff's interest. As this Court said in *Caltex, supra*, 344 U.S. at 156, "No rigid rules

[5] *Dickinson* states that a constitutional "taking" occurs when one would say, as between private parties, that a servitude had been created on the land. 331 U.S. at 748. Such a relationship, it indicated, would arise only by agreement or over the course of time. Moreover, the only mention of the "servitude" concept in public emergency cases suggests that there is a preexisting servitude impressed on all private property for the government's access under the compulsion of emergency. *Metallic Compression Casting Co.* v. *Fitchburg R. Co.*, 109 Mass. 277. Thus, the government need "take" nothing, for it already possesses the right to enter. We need not and do not argue, however, that the government may exercise its access right, however often emergencies occur, without *ever* incurring an obligation of compensation. On this record, it suffices that the entry was occasional, and hence insufficient to justify petitioners' claim.

can be laid down to distinguish compensable losses from noncompensable losses. Each case must be judged on its own facts." See also *Armstrong* v. *United States*, 364 U.S. 40, 48. But in no case has the Court found a taking for public use where property, located by chance at the heart of an emergency situation, is temporarily entered by public officers for the purpose of dealing with that emergency, and under the compulsion of that emergency situation.[6]

B. UNDER THE ESTABLISHED DOCTRINE OF "PUBLIC NECESSITY," COMPENSATION IS NOT DUE FOR DAMAGE INFLICTED UNDER THE COMPULSION OF A PUBLIC EMERGENCY

This case falls squarely within the established doctrine of "public necessity," which recognizes the right of public officers to enter and use private property without need for compensation if they do so under the compulsion of a community emergency. Petitioners' principal citations and discussion concern cases in which the existence of a state of necessity at the time

[6] Since petitioners' claim is that their buildings were taken for use when the main body of troops fell back from the boundary and reentered them, they would be entitled to compensation, if at all, without regard to the damage the rioters did. That is, had the troops been entirely successful and no damage been done, petitioners still would have a claim for the value of three days' use of their facilities. Given the emergency situation which required the troops' presence—compare *Brigham* v. *Edmands*, 73 Mass. (7 Gray) 359, where militia were engaged in annual training exercises—none of the cases petitioners cite suggests that such a claim would be honored. Indeed, the existence of that situation makes plain that the troops' presence was not adverse to petitioners' interest. Throughout Panama, mobs were attacking and burning "American" property, whether or not troops were there to guard it. The alternative was to protect the buildings and boundary from within or not to protect them at all.

public officers acted was the principal question. In general, the decisive factor in these cases has been the possibility of deliberate action or choice by the officials concerned. That possibility was clearly lacking here.

1. There is no liability for damage inflicted under the compulsion of a municipal emergency

As this Court noted in *United States* v. *Caltex*, 344 U.S. 149, 154 and n. 6, during a municipal emergency, the government may, "with immunity, destroy the property of a few that the property of many and the lives of many more could be saved." See, also *Surocco* v. *Geary*, 3 Cal. 69, 73–74; *Field* v. *Des Moines*, 39 Iowa 575; *Taylor* v. *Plymouth*, 49 Mass. (8 Metc.) 462; *Keller* v. *Corpus Christi*, 50 Tex. 614; *Aitken* v. *Wells River*, 70 Vt. 308.[7] In each of these cases, as here, the governmental forces were drawn without choice to the site where the conflagration was and had to deal with it at that place. But they presented stronger cases for recovery, for there the community

[7] The two cases *contra*, *Bishop* v. *Macon*, 7 Ga. 200, and *Mayor* v. *Lord*, 17 Wend. (N.Y.) 285, affirmed, 18 Wend. 126, have attracted little following. Both concerned claims for personal property stored in the destroyed buildings, and both courts appeared to conclude that the municipality concerned had a choice, at least as to the timing of the destruction, which might have permitted more to be saved. *Mayor* v. *Lord* has been interpreted as resting on statutory rather than constitutional grounds, *Aitkin* v. *Wells River*, *supra*, at 311, and was cited by this Court only for the proposition that compensation for emergency destruction is not constitutionally compelled, *United States* v. *Pacific R. Co.*, 120 U.S. 227, 234.

itself had deliberately inflicted the property damage for which compensation was sought, in an effort to halt the wider spread of the emergency. *A fortiori,* compensation should be denied here, where the damage was done by the mob when the riot control measures employed against it proved ineffective.[8] In this respect, it is as if firemen went into a building neighboring another which was afire, but were unable to prevent the flames from spreading; no one has suggested that their presence at the place where the fire could be fought most efficiently is a constitutional taking of that place.

2. There is no liability for damage inflicted under the compulsion of war

a. In general

The decisions relating to emergency action by military forces in the field during wartime lead to the same conclusions. These decisions consistently distinguish between property deliberately taken for the service or subsequent use (however promptly) of the military forces and property damaged or destroyed with no practical range of choice during a hostile engagement. Compensation is allowed for the former, because the property was designedly impressed into public service. *E.g., United States* v. *Russell,* 13 Wall. 623. It has been denied for the latter as an unavoid-

[8] On this constitutional claim, it is irrelevant whether the government properly withheld use of means which might more effectively have controlled the rioters, such as earlier or less selective use of deadly weapons.

able consequence of the fortunes of battle." *United States* v. *Pacific Railroad Co.*, 120 U.S. 227; *United States* v. *Caltex*, 344 U.S. 149.

In the *Russell* case, three steamboats were impressed into Army service for periods of from 26 to 60 days; the Court ruled (p. 629) that the "impending public danger" authorized the taking but that there was "an obligation on the part of the government to reimburse the owner to the full value of the service."

In *Pacific Railroad*, railroad bridges were destroyed by the Army to prevent the advance of Confederate forces; the Court distinguished this case from the *Russell* situation as follows (p. 239):

> The principle that, for injuries to or destruction of private property in necessary military operations during the civil war, the government is not responsible is thus considered established. Compensation has been made in several such cases, it is true; but it has generally been, as stated by the President in his veto message, "a matter of bounty rather than of strict legal right."
>
> In what we have said as to the exemption of government from liability for private property injured or destroyed during war, by the oper-

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" See also the sources discussed in the Appendix, *infra*, pp. 46–57, especially H. Rep. No. 134, 43d Cong., 2d Sess., pp. 266–297. Many losses are attributed solely to the fortunes of war, not to the sovereign. *Lichter* v. *United States*, 334 U.S. 742, 787–788; *Bowles* v. *Willingham*, 321 U.S. 503, 517–519; *Omnia Co.* v. *United States*, 261 U.S. 502; *Franco-Italian Packing Co.* v. *United States*, 130 C. Cls. 736, 128 F. Supp. 408; *Hongkong & Shanghai Banking Corporation* v. *United States*, 136 C.Cls. 514, 145 F. Supp. 229; *Aleutian Livestock Company, Inc.* v. *United States*, 119 C.Cls. 326.

> ations of armies in the field, or by measures necessary for their safety and efficiency, we do not mean to include claims where property of loyal citizens is taken for the service of our armies, such as vessels, steamboats, and the like, for the transport of troops and munitions of war; or buildings to be used as storehouses and places of deposit of war material, or to house soldiers or take care of the sick, or claims for supplies seized and appropriated. In such cases, it has been the practice of the government to make compensation for the property taken. * * *

In *United States* v. *Caltex*, 344 U.S. 149, petroleum products and related equipment in Manila were destroyed by the Army in the face of advancing Japanese troops. This Court explained *United States* v. *Russell*, 13 Wall. 623, and *Mitchell* v. *Harmony*, 13 How. 115 (where the Army used a merchant's mules and wagons), as cases involving "equipment which had been impressed by the Army for subsequent use by the Army" (p. 153); it found that the *Pacific Railroad* case "is the law today" (at 154), and stated the distinction between compensable and non-compensable damage in terms similar to the above (at 155–156). It held the seizure and destruction non-compensable.

The subsequent dispute over *Caltex* has not concerned the general distinction it recognized between damage inflicted by the fortunes of battle, on the one hand, and taking for use, on the other. That distinction is accepted by all; the critics of *Caltex* argue simply that the battle damage category must be limited to acts necessitated by the immediate demands of battle, and thus should not include so-called "denial de-

struction" when that is undertaken for long-range purposes of war, as it arguably was in that case.[10]

Since the buildings in this case were at the center of the battle as the troops found it, and were occupied under the necessities of that battle as it developed, all the authorities would agree that there could be no claim. "In respect of a house that has the misfortune to be in the centre of a battle field and is inevitably demolished * * * it is clear, on the principles which have been almost unanimously set out, that the subject can have no claim." *Burmah Oil Co.* v. *Lord Advocate,* [1964] 2 All Eng. Rep. 348, 394 (H.L.; opinion of Lord Pearce, for the plaintiff).[11]

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[10] *E.g., Burham Oil Co.* v. *Lord Advocate,* [1964] 2 All Eng. Rep. 348, 355, 360 (Lord Reid, for the plaintiff), 394 (Lord Pearce, for the plaintiff); Note, *The Burham Oil Affair,* 79 Harv. L. Rev. 614, 621–622 (1966); Van Alstyne, *Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction,* 20 Stan. L. Rev. 617, 620–621. It may be noted that the 3–2 victory of Burham Oil in the House of Lords, on which petitioners heavily rely in criticising this Court's *Caltex* decision, was promptly reversed by an Act of Parliament, The War Damage Act, 1965, c. 18, 45 Hals. Stat. Eng. 1758 (1965), because of the apparent injustice of making possibly huge recoveries available to a group of privileged companies while widows and disabled veterans were limited to sharing what the nation could afford, 79 Harv. L. Rev. at 626. The injustice is not entirely eliminated by careful limitation of damages through a realistic view of what could otherwise have been saved; lives lost in the conflict are not compensated even in that measure.

[11] Thus, when De Vattel speaks of "a field, a house, or a garden * * * taken for the purpose *of erecting* * * * a * * * rampart * * *." *Le Droit des Gens.* Book III, c. 15, Par. 232, (emphasis supplied), cited in petitioners' brief at pp. 22–23, he is speaking of acts "done deliberately and by way of precaution" *i.e.,* matters regarding which there existed some choice consistent

b. Under the "target" doctrine

There is one exception sometimes recognized to this general distinction, and it is on an analogy to that exception that petitioners ultimately rely. The exception arises in international arbitration, where a citizen of country A claims compensation for damage to his property in country B occurring in a war between B and insurgents or a third country. As Whiteman points out, *Damages in International Law*, Vol. 2, 1419 ff. (1937), damages are permitted if it is found that the troops of B acted "so as to expose that property particularly to enemy fire," at 1421, even though it might otherwise be found that the damage constituted "battle damage" for which compensation is not ordinarily awarded.

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with the general conduct of war. No compensation is due for "damages, caused by inevitable necessity as for instance, the destruction caused by the artillery in re-taking a town from the enemy. These are merely accidents—they are misfortunes which chance deals out to the proprietors on whom they happen to fall. * * * [N]o action lies against the state for misfortunes of this nature—for losses which she has occasioned, not wilfully, but through necessity and by mere accident, in the exertion of her rights. The same may be said of damages caused by the enemy" (*ibid.*). Similarly, the *Case of the King's Prerogative in Saltpetre*, 12 Coke's Rep. 12, 77 Eng. Rep. 1294 (1606), involved acquisition of saltpeter to make gunpowder for subsequent use; in *Attorney General* v. *DeKeyser's Royal Hotel* [1920] A.C. 508, [1920] All Eng. Rep. 80, the Crown took possession of a London Hotel for subsequent use as headquarters of the Royal Flying Corps; and in *Mouse's Case*, 12 Coke's Rep. 63, 77 Eng. Rep. 1341 (1608), the goods of one ferry passenger were chosen without particular necessity from among those available to be thrown overboard in a tempest to save all lives. The *Burmah Oil* court would not have found liability if the oil fields had been in the path of the Japanese army, and had been destroyed to slow its advance. [1964] 2 All Eng. Rep. at 360, 394, 399.

In each of the cases in which this doctrine was applied, the military had selected the site in advance, and thus could be said intentionally to have drawn the enemy's fire to that point. *Putegnat's Heirs,* IV Moore, *International Arbitration,* 3718–3720 (1871); *American Elec. & Mfg. Co.,* Ralston's Report 128 (1904); and *Anunziata Petrocelli,* Ralston's Report 762 (1904). In the present case, no such preselection could be found; the troops lined the boundary, facing the rioters where they found them, and retreated into all available buildings along the boundary when that became necessary to its continued defense.[12]

Moreover, a study of the cases shows that the doctrine is particularly suited to the international law context in which it is recognized. Thus, in *Shattuck's Case, Rigg's Case,* and *Blumenkron's Case,* IV *Moore, supra,* 3668–3669, compensation was denied on findings that the homes of citizens were equally exposed to damage; *Putegnat's Heirs, supra,* stresses as crucial the fact that the damaged property was deliberately

[12] In stating in our opposition to petitioners' motion for summary judgment below that petitioners were entitled to recovery if in fact the troops seized and used their buildings for refuge and defense, we did not mean to suggest that petitioners could recover simply on a showing that greater safety from sniper fire and Molotov cocktails was one factor influencing their retreat. A reading of the opposition as a whole makes plain that our position was exactly as it is here: if there had been a deliberate selection of petitioners' buildings as places specially suited for the safety of the troops, resulting in a drawing of the rioters to the spot whence they did the damage, the government would be liable; but that here the government acted under the compulsion of the existing emergency to use all tenable locations for the defence of the border under attack, and hence was not liable.

chosen for use as a fort. One may infer that the policy behind the doctrine is to discourage preferential choice of foreigners' properties as the site for hostilities, or to assure equal protection of foreigners' properties during conflict. Such considerations are of limited importance within the framework of national law. In any event, it is plain that in this case the government did not draw the rioters to private property so as to spare its own: the Commissary, the third building of the salient, was equally the subject of protection, attack and destruction.

Finally, as petitioners themselves note by the emphasis they supply to quoted passages (Pet. Br. 29, 31), this "target" theory is applicable whether country B's troops are inside or merely in front of the foreigner's property. If applied under the Fifth Amendment in cases such as this one, this theory would lead to extraordinary results. Although, as it happened, petitioners did not need to make the claim, the theory if applicable would have required compensation had the buildings been set afire while the troops were standing in the street just in front of them. Even then, they were drawing sniper fire and Molotov cocktails from the rioters, endangering the buildings as well as themselves; and that, plus the element of exposure-in-particular, is all the theory requires.[13] But again, the troops did not even draw the rioters into the general area, much less to these two

[13] It would appear quite arguable, for example, that an Air Force base, missile site or similar installation, makes the area in which it exists a target for enemy attack as against other areas not thus favored.

on petitioners' view of the facts,

buildings in particular; the rioters were there when the troops arrived.

IV. THIS CASE AFFORDS NO OCCASION TO REEXAMINE THE COURT'S DECISION IN *UNITED STATES* V. *CALTEX*, 344 U.S. 149

As has already been shown, the only respect in which this Court's *Caltex* decision is significant to this case is its recognition that in cases of "public necessity" arising in either a civil or a military context, the government is not liable under the Fifth Amendment even for damage intentionally inflicted on a person's property. The possibly controversial holding in that case—that deliberate "denial destruction" for arguably long-range purposes of war falls within the "public necessity" class—is not in issue here, since the government was acting to protect, not to destroy, the property in question. Rather than constituting an extension of *Caltex* as petitioners assert, on its facts this case falls squarely within that aspect of the "public necessity" doctrine which has been almost unanimously recognized by the cases and the commentators.

Nonetheless, for the Court's convenience, we have reprinted relevant portions of our *Caltex* brief in an Appendix, *infra*. In response to petitioners' contentions, we rely upon that brief and this Court's opinion.

CONCLUSION

For the foregoing reasons, we submit that the judgment of the Court of Claims should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
GLEN E. TAYLOR,
Acting Assistant Attorney General.
PETER L. STRAUSS,
Assistant to the Solicitor General.
ROGER P. MARQUIS,
S. BILLINGSLEY HILL,
Attorneys.

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APPENDIX

Excerpts from the brief of the United States in *United States* v. *Caltex*, No. 16, October Term, 1952

ARGUMENT

THE DESTRUCTION DURING HOSTILITIES OF PRIVATE PROPERTY OF MILITARY VALUE, TO PREVENT SUCH PROPERTY FROM FALLING INTO THE HANDS OF THE ADVANCING ENEMY, IS NOT A TAKING FOR PUBLIC USE WHICH REQUIRES THE PAYMENT OF JUST COMPENSATION UNDER THE FIFTH AMENDMENT

The sole question in this case is whether the command of the Fifth Amendment, "nor shall private property be taken for public use, without just compensation," requires the United States to pay for private property of military value which was destroyed by its armed forces to prevent such property from falling into the hands of advancing enemy forces. The decision below is based upon the view that the destruction of property "to deny it to the enemy was as much a public use as if it had been consumed by friendly troops in battle" (IR. 51) and must therefore be paid for under the Fifth Amendment. We contend that the decision is erroneous in that by exalting the supposed equities of this case into a rigid constitutional rule it potentially exposes the United States to financial burdens which no government dares to assume, and in that it disregards the contrary interpretation of the Fifth Amendment by this Court, the Congress and the President.

A. THE UNITED STATES CANNOT ASSUME A RIGID AND UNLIMITED LIABILITY FOR PROPERTY WHICH IT DESTROYS TO DENY ITS USE TO AN ENEMY

In later subsections of the brief, we point out that this Court, the Congress, and the President have all denied liability for property of military value destroyed to prevent its use by the enemy. In this part, we shall treat the matter as *res nova* and detail the underlying considerations making it inadvisable and inappropriate for the Court to lay down any rigid rule, rooted in the Constitution, of liability in such circumstances.

No government assumes a legal obligation to compensate its citizens for property destroyed in battle, whether by the action of its own or enemy forces. Governments do not legally obligate themselves to pay for such damage because it often reaches such proportions that they cannot afford to do so fully, as would be required under any legal principle of just compensation. Property destroyed to prevent it from falling into the hands of the enemy is just as much the result of military operations as battle damage. It is neither practical nor equitable to attach to the former a rigid right to full compensation which concededly does not exist with respect to battle damage.

The property here involved consisted of oil terminal facilities owned by the three respondents and located in Manila, Philippine Islands. The unchallenged findings of the Court of Claims are that the property was requisitioned by the Army on December 27, 1941, "in anticipation and for the purpose of destruction to prevent items of military value from falling into the hands of the enemy" (IR. 42) and that the property was destroyed on December 31, when the Japanese forces were entering Manila (IR. 48). It is undisputed that these circumstances justified the destruction of

the property, so that damages could not be recovered from the Army personnel who directed the destruction. *Mitchell* v. *Harmony,* 13 How. 115, 133.

If the Japanese forces had destroyed the oil terminals while they were in American hands, as by bombing or shelling, the United States clearly would not be obligated under the Fifth Amendment to compensate the respondents for the loss of their property. Similarly, if the Japanese forces had captured the oil terminals intact, and the terminals were then destroyed by the United States, as by bombing or shelling, the United States would be under no obligation to pay for such destruction. *Perrin* v. *United States,* 4 Ct. Cl. 543, 547–548, affirmed, 12 Wall. 315. These propositions apparently are conceded by the court below (IR. 54) and by the respondents (Br. in Opp., pp. 7–8), on the ground that they would be "due to the ravages of war inflicted by our own or enemy forces in the conduct of a campaign" (IR. 54). We submit that, both from the point of view of the owners and in the lack of beneficial use by the United States, there is no basis for distinguishing the destruction of property to deny it to the enemy from the destruction of property by the enemy or while in the enemy's possession. Compensation is not required for either, and for the same reasons.

Viewed realistically, the military situation on December 27, 1941, had rendered the Pandacan oil terminals completely without value to the respondents. If the United States had not systematically destroyed the oil terminals when it did, they would have been in the hands of the Japanese a few hours or a day later. As soon as they were in Japanese possession, American airmen or ground raiders, at the risk of their lives, could have destroyed the terminals without imposing upon the United States any obligation to com-

pensate the owners. It is completely anomalous to say that the Fifth Amendment imposes an obligation to pay because the terminals were thoroughly and safely destroyed while still in American possession to deny their use to the Japanese. The Constitution places no such premium upon the hard way of waging war.[1]

From respondent's point of view, it could make no difference whether their terminals were destroyed before or after they fell into Japanese hands. As President Grant, whose authority in military matters will be conceded, stated in vetoing a bill providing payment for a Kentucky salt works which was destroyed by Union forces to deny its use to the Confederacy, "Had General Craft and his command destroyed the salt-works by shelling out the enemy found in their actual occupancy, the case would not have been different in principle from the one presented in this bill. What possible difference can it make in the rights of owners or the obligations of the Government, whether the destruction was in driving the enemy out, or in keeping them out, of the possession of the salt-works?"[2]

Here, the destruction of the respondents' oil terminals was as much the result of the military situation, rather than a "taking" by the United States, as though it had been destroyed in actual battle. As the dissenting opinion below points out (IR. 60): "There

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[1] During World War I, the retreating Allies severely damaged the Rumanian oil fields to deny their use to the advancing Germans (See *infra*, p. 60). In World War II, with Rumania on the side of the Axis powers, only air attack could deprive Germany and her Allies of Rumanian oil. The first American raid on the Ploesti refineries cost 54 planes. *The Army Air Forces in World War II*, vol. II, pp. 477–483. The total cost of depriving the Axis powers of the use of the Ploesti facilities included the loss of 350 heavy bombers. *Id.*, vol. III, p. 298

[2] Senate Ex. Doc. 42, 42d Cong., 3d Sess.

was no hope of saving the property. If the city were further defended, the property would undoubtedly be destroyed. If it fell into the hands of the Japanese it would certainly be destroyed before they gave it up. In fact, practically all Manila, residential and otherwise, was destroyed in the process of retaking three years later. Any possible value to the plaintiffs was gone whichever horn of the dilemma is taken." In the words of the House Committee on War-Claims, House Report 134, 43d Cong., 2d Sess., p. 284 (the so-called Lawrence report), "A nation should not be liable for property taken to prevent it from falling into the hands of an enemy, because it is impossible to establish any just measure of damages. What is the value of property liable to the imminent impending danger of being taken or destroyed by rebels? Why should the Government pay when the markets of the world could not supply another purchaser?"

The value to its owners of property of military value in the path of an advancing enemy is so hopelessly speculative as to preclude any obligation to pay for its destruction to deny it to the enemy. To paraphrase the Lawrence report, why should the United States pay for the destruction of oil terminals on December 31 which it could destroy on January 1 without any obligation to pay? It was this absence of value to the owners of property thus situated and destroyed by the United States which led Judge Loring to dissent in *Grant* v. *United States*, 2 Ct. Cl. 551, and prompted even the court below in this case to state (IR. 54) that, "The nearness of the enemy and the causes necessitating the destruction, we feel, made the Army's action lawful *and may have a bearing upon the question of damages* * * *." [Emphasis supplied.]

Since the destruction of property to deny its use to the enemy is indistinguishable from other war dam-

age, both from the point of view of the owners and in the lack of beneficial use by the United States, the reasons why the United States should not be required to pay compensation are identical. Governments do not *obligate* themselves to pay for battle damage to their citizens' property, whether caused by their own or enemy forces, because they cannot afford to assume what may be enormous obligations. Similarly, governments do not dare commit themselves to pay full compensation for their citizens' property which they destroy pursuant to a policy of defensive devastation. As stated by this Court in *United States* v. *Pacific Railroad,* 120 U.S. 227, at pp. 233–234, with reference to the Civil War:

> The injury and destruction of private property caused by their operations, and by measures necessary for their safety and efficiency, were almost beyond calculation.
>
> * * * * *

It is impossible not to regret the losses incurred by the respondents through no fault of their own. It is also true that if Congress chose, as a matter of grace, to reimburse American property owners for the relatively small amount of their property which was destroyed to deny it to the enemy during World War II, no serious financial consequences would ensue. However, the fact that other nations have had occasion to apply this military policy on a large scale warns that the Fifth Amendment should not be construed to place upon the United States a rigid obligation to pay which, under certain conditions, might create impossible financial burdens for the Government.

Given the destructiveness of any future warfare, responsible governments need to retain freedom of action to deal with great devastation in terms of overall reconstruction needs and priorities. In such cir-

cumstances, for example, much battle damage, admittedly non-compensable under the Fifth Amendment, might require priority for restoration out of public funds over damage as to which the decision below imposes an absolute obligation upon the United States. The prime purpose of such a reconstruction program would be to insure the replacement of essential facilities, rather than to put cash in the pockets of former property owners. Thus, Section 104 (c) of the Philippine Rehabilitation Act of 1946, 60 Stat. 128, 130, requires that payments made under that Act be used to replace or repair the damaged property or, where that is impossible, "reinvested in such manner as will further the rehabilitation or economic development of the Philippines."[3] Such problems of reconstruction after destructive warfare cannot be solved by creating rigid legal rules for the payment of compensation for particular types of war damage.

B. EVEN AS AN ORIGINAL MATTER, SUCH DESTRUCTION WOULD NOT CONSTITUTE A TAKING OF PROPERTY FOR PUBLIC USE WITHIN THE MEANING OF THE FIFTH AMENDMENT

* * * * *

* * * Property may be destroyed without compensation under the doctrine of inevitable necessity—the

[3] See also Section 20, Part I, War Damage Act, 1943, 6 & 7 Geo. VI, c. 21:

> The Treasury shall give directions to be observed by the Commission for securing that the provisions of this Part of this Act relating to the making of payments in respect of war damage shall be executed in conformity with the public interest as respects town and country planning, the provision of housing accommodation, the development of industries and services and of agriculture, the preservation of amenities, the consumption of supplies of building materials for the time being available, the building requirements of persons engaged in work of public importance, and such other matters as may be prescribed.

doctrine epitomized by the maxim *salus populi est suprema lex.* It is well-settled that the destruction of a house in the path of a conflagration to prevent the spread of the fire is not an eminent domain "taking." *Bowdickh* v. *Boston,* 101 U.S. 16; *Field* v. *City of Des Moines,* 39 Iowa 575; *Russell* v. *The Mayor,* 2 Denio (N.Y.) 461; *American Print Works* v. *Lawrence,* 23 N.J.L. 590, 605–607, 615; *McDonald* v. *City of Red Wing,* 13 Minn. 38. Similarly, the destruction of a mill and dam during a freshet to prevent the washing out of a highway does not require the payment of compensation. *Aitken* v. *Village of Wells River,* 70 Vt. 308. And, of particular significance here, it has been held that action by municipal authorities in collaboration with the townspeople to destroy liquor which otherwise would have fallen into the hands of advancing Federal troops during the Civil War was a justifiable, non-compensable destruction. *Harrison* v. *Wisdom,* 54 Tenn. 99; *Wallace* v. *City of Richmond,* 94 Va. 204. See also *Parham* v. *The Justices,* 9 Ga. 341, 349; *Respublica* v. *Sparhawk,* 1 Dall. (Pa.) 357, 362.

The losses necessarily incident to the actual conduct of hostilities, we submit, stand on no different constitutional footing than these other non-compensable losses. Plainly, the destruction of a basic war material on the field of battle to prevent its imminent capture and use by the enemy is no less a justified destruction of property than the destruction of valuable cedar trees to prevent the spread of cedar rust to apple trees (*Miller* v. *Schoene,* [276 U.S. 272]) or the destruction of fishing nets to preserve wildlife (*Lawton* v. *Steele,* [152 U.S. 133]). Property which will undoubtedly be used by the enemy if captured is certainly no less a "nuisance" necessitating abatement than diseased cattle or decayed and unwholesome food

(*North American Storage Co.* v. *Chicago,* [211 U.S. 306]). Nor can it be thought that the dictates of national self-preservation in the path of war are any less stringent than those of community preservation in the path of conflagration. The considerations of policy underlying the doctrine of inevitable necessity are immeasurably stronger in the circumstances here involved. As applied in the conflagration cases, the destruction of property is held justified even though it benefits but a few individuals. In contrast with that limited public purpose, the destruction of the respondents' properties served a common national need. Here, "*salus populi* is then, in truth, *suprema lex.*" *United States* v. *Pacific Railroad,* 120 U.S. 227, 234.[4] It is the nature of modern war that few can count confidently upon emerging unscathed. "In total war it is necessary that a civilian make sacrifices of his property and profits with at least the same fortitude as that with which a drafted soldier makes his traditional sacrifices of comfort, security and life itself." *Lichter* v. *United States,* 334 U.S. at 745. See also *United States* v. *Bethlehem Steel Corp.,* 315 U.S. 289, 305.

[4] The opinion below suggests that the right to destroy another's property under the pressure of overbearing necessity and self-preservation is a right as between individuals and has no connection with the state's right of eminent domain (IR. 51, 55). This attempted distinction errs in two respects. First, it has long been recognized that the Nation possesses the right of self-preservation. *Dennis* v. *United States,* 341 U.S. 494, 501, 519. And, certainly, the Nation's right of self-preservation is of no less status than that of an individual. Second, the destruction of the respondents' properties was not an exercise of eminent domain but an exercise of the war power, resting upon the doctrine of necessity. *Mitchell* v. *Harmony,* 13 How. 115; *Ford* v. *Surget,* 97 U.S. 594, 606; see also 1 Nichols, *The Law of Eminent Domain* (3 Ed.) §§ 1.43, 1.44, 1.44 [7].

C. THIS COURT HAS HELD THAT THE FIFTH AMENDMENT DOES NOT REQUIRE PAYMENT OF COMPENSATION FOR PROPERTY DESTROYED BY THE UNITED STATES TO DENY ITS USE TO THE ENEMY OR OTHERWISE TO PROTECT AMERICAN FORCES

Although recognizing that the destruction of property by either belligerent as an incident to battle does not create an obligation to pay for such property, the court below held that the Fifth Amendment requires payment of compensation for property destroyed to deny its use to the enemy. In so holding, the court relied upon its own earlier decisions in *Grant* v. *United States*, 1 Ct. Cl. 41 (1863) and *Wiggins* v. *United States*, 3 Ct. Cl. 412 (1867) and the dictum of this Court in *Mitchell* v. *Harmony*, 13 How. 115, 133 (1851). At the same time, the court below ignored the rationale of this Court's later decisions in *United States* v. *Pacific Railroad*, 120 U.S. 227, and *Juragua Iron Co.* v. *United States*, 212 U.S. 297, which reject the rule of the *Grant* and *Wiggins* cases.

Mitchell v. *Harmony, supra*, was an action for damages brought against an American army officer who, by compelling an American trader to accompany American forces on an expedition into Mexico during the Mexican war, brought about the loss of the latter's property. With respect to the defense that the trader had been required to remain with the army in order to prevent his property from falling into the hands of the enemy, this Court stated (at p. 133) that:

> There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser.

Since the suit was against the officer rather than the United States, it is clear, as the court below noted (R. 50), that the suggestion that the United States must pay compensation for property destroyed to deny it to the enemy is entirely dictum.

The question was presented squarely to the Court of Claims in *Grant* v. *United States, supra,* which involved the destruction by Union forces in Arizona of property of military value to deny its use to advancing Confederate forces. Relying upon Vattel, the minority view in the conflagration cases (see *supra,* pp. 23–24), and the dictum in *Mitchell* v. *Harmony,* the court below held that such destruction was a taking for public use for which the Fifth Amendment required payment of just compensation. In 1864, a year later, Congress deprived the Court of Claims of jurisdiction over such claims, *inter alia,* arising out of the Civil War (*infra,* pp. 42–43). However, in 1867, *Wiggins* v. *United States, supra,* involving an analogous set of facts arising out of the American naval bombardment of Greytown, Nicaragua, was decided by the Court of Claims on the authority of its own decision in the *Grant* case.

It should be noted that, in several cases arising under the Act of July 4, 1864, 13 Stat. 381, and the Act of March 3, 1883, 22 Stat. 485, which withdrew jurisdiction over war damage claims from the Court of Claims, the court below subsequently expressed its disapproval, by way of dictum, of the *Grant* and *Wiggins* decisions. *Walker* v. *United States,* 34 C. Cls. 345, 346; *Presbyterian Church* v. *United States,* 33 C. Cls. 339, 340; *Heflebower* v. *United States,* 21 C. Cls. 228, 237–238. In the instant case, the court indicated its awareness that it had itself questioned the rule of the *Grant* and *Wiggins* cases, by stating that (R. 51) "Certain cases decided in this court under the Bow-

man Act (13 Stat. 381) [sic] contained dicta indicating that if the question had been then presented to the court, a contrary result might have been obtained" (citing the *Walker* and *Presbyterian Church* cases).

In any event, with this Court's decision in 1887 in *United States* v. *Pacific Railroad,* 120 U.S. 227, it was authoritatively established that the Fifth Amendment does not require the United States to pay for property destroyed to deny its use to the enemy. Briefly stated, the facts in the *Pacific Railroad* case were these: During the Civil War, a number of railroad bridges had been destroyed in Missouri, by order of the Federal commanding general, to prevent the advance of the enemy. Other bridges had been destroyed by the Confederate forces during their invasion of the State. To further the operations of its armies, the United States rebuilt four of those bridges, two of which had been destroyed by the Federal forces and two by the Confederate forces, Subsequently, to reimburse itself for the cost of rebuilding the bridges, the United States withheld payments due the Railroad for transportation services rendered The Railroad brought suit to recover the sums due, and challenged the right of the United States to offset the costs of reconstruction.

This Court held that the destruction of the bridges was an act of military necessity for which the Government was not liable, and that their reconstruction was also a military necessity for which the Government could not charge the Railroad. In reaching this result, the Court considered exhaustively the nature of government liability for the taking and destruction of property "during war, by the operations of armies in the field, or by measures necessary for their safety and efficiency." (120 U.S. at 239.) Drawing a distinction between property destroyed for military purposes

and property taken for use by the Army, the Court stated with regard to the first category that (*id.* at 233–234):

> More than a million of men were in the armies on each side. The injury and destruction of private property caused by their operations, and by measures necessary for their safety and efficiency, were almost beyond calculation. *For all injuries and destruction which followed necessarily from these causes no compensation could be claimed from the Government.* By the well settled doctrines of public law it was not responsible for them. The destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, had to be borne by the sufferers alone as one of its consequences. *Whatever would embarrass or impede the advance of the enemy, as the breaking up of roads, or the burning of bridges, or would cripple and defeat him, as destroying his means of subsistence, were lawfully ordered by the commanding general.* Indeed, it was his imperative duty to direct their destruction. The necessities of the war called for and justified this. *The safety of the state in such cases overrides all considerations of private loss. Salus populi* is then, in truth, *suprema lex.* [Italics supplied.]

As to the second category of war losses, the Court declared (*id.* at 239):

> In what we have said as to the exemption of government from liability for private property injured or destroyed during war, by the operations of armies in the field, or by measures necessary for their safety and efficiency, we do not mean to include claims where property of loyal citizens is taken for the service of our armies, such as vessels, steamboats, and the like, for the transport of troops and munitions of war; or buildings to be used as storehouses

> and places of deposit of war material, or to house soldiers or take care of the sick, or claims for supplies seized and appropriated. In such cases, it has been the practice of the government to make compensation for the property taken. Its obligation to do so is supposed to rest upon the general principle of justice that compensation should be made where private property is taken for public use, although the seizure and appropriation of private property under such circumstances by the military authorities may not be within the terms of the constitutional clause. *Mitchell* v. *Harmony,* 13 How. 115, 134; *United States* v. *Russell,* 13 Wall. 623.

Concluding that the Railroad was not entitled to compensation for the bridges destroyed, the Court held that, conversely, the Government could not recover for private property values created during military operations (*id.* at 239):

> *While the government cannot be charged for injuries to, or destruction of, private property caused by military operations of armies in the field, or measures taken for their safety and efficiency, the converse of the doctrine is equally true,* that private parties cannot be charged for works constructed on their lands by the government to further the operations of its armies. *Military necessity will justify the destruction of property,* but will not compel private parties to erect on their own lands works needed by the government, or to pay for such works when erected by the government. The cost of building and repairing roads and bridges to facilitate the movements of troops, or the transportation of supplies and munitions of war, must, therefore, be borne by the government. [Italics supplied.]

Respondents' assertions that the *Grant, Wiggins,* and *Mitchell* cases were nowhere rejected by the Court

and that the Court's statement that the Government "was not responsible for * * * the burning of bridges" (*id.* at 234) was a "gratuitous dictum" (Br. in Opp., p. 24) are flatly contradicted by the reasoning of the Court and the result reached. Admittedly, the Court was not required to decide whether the Railroad could have recovered in an action for compensation for the destruction of the bridges, since the Railroad had not made a claim for such compensation. It is apparent from the opinion, however, that the Court considered it necessary to decide that question before reaching the question of the Railroad's liability to the Government for the reconstruction of the bridges. If the destruction of the bridges was a taking for a public use within the meaning of the Fifth Amendment, it necessarily followed that the Government could not charge the Railroad for the reconstruction of the bridges. Being obligated to indemnify the Railroad for the destroyed bridges, the Government's reconstruction of the bridges would merely have been in lieu of the payment of just compensation. Indeed, this was the very argument made by the Railroad in its brief before the Court. Citing the *Grant*, *Wiggins* and *Mitchell* cases, the Railroad argued that the Government's claim for compensation rested upon an expenditure which natural justice and equity would require it to make and urged the Court to leave the parties where the events of war had left them. See Brief for the Pacific Railroad, Nos. 728, 1303, October Term, 1886, pp. 26–33.[5]

[5] In the Court of Claims, the Pacific Railroad made the same argument as it did in the Supreme Court, relying upon *Vattel* and upon the *Grant*, *Wiggins*, *Mitchell* and *Russell* decisions. See Brief in Court of Claims No. 11,825, December Term, 1884–1885.

As shown above, the Court did not adopt that view of the legal consequences of the destruction. It ruled instead that "while the government cannot be charged for injuries to, or destruction of, private property caused by military operations of armies in the field, or measures taken for their safety and efficiency, the converse of the doctrine is equally true, that private parties cannot be charged for works constructed on their lands by the government to further the operations of its armies." (*Id.* at 239.) It can hardly be supposed, therefore, that this Court was unaware of the *Grant*, *Wiggins* and *Mitchell* cases, or of the fact that its reasoning was incompatible with statements in those opinions. We think it not without significance that the Court cited the *Mitchell* case solely for the proposition that the Government was liable for the military requisition and use of private property (*id.* at 239). On the other hand, as authority for its pronouncement that Government was not liable for the burning of bridges to "embarrass or impede the advance of the enemy," the Court relied, as we do here, upon the familiar conflagration cases referred to above, pp. 23–24. (*Id.* at 234).

In sum, the issue here presented was necessarily met and fully considered by this Court in the *Pacific Railroad* case. To quote the dissent below, "if the railroad bridges were not 'taken for public use', then neither were the oil terminal facilities at Pandacan." (IR. 59).

* * * * *

D. THE REPEATED REFUSAL OF CONGRESS TO PAY FOR PROPERTY SO DESTROYED IS PERSUASIVE EVIDENCE THAT THE FIFTH AMENDMENT DOES NOT REQUIRE SUCH PAYMENT OF COMPENSATION

The conclusions reached by this Court in *United States* v. *Pacific Railroad*, 120 U.S. 227, and *Juragua*

Iron Co. v. *United States,* 212 U.S. 297, find the strongest confirmation in the view of Congress, maintained from the earliest days, that the Fifth Amendment imposes no legal obligation upon the United States to pay for property destroyed to deny its use to the enemy. Even if the question were an open one in this Court, this long-continued Congressional interpretation of the Fifth Amendment would be almost decisive. But, as we have shown, this Court has already accepted the view of Congress that compensation in the circumstances of the present case is "a matter of bounty rather than of strict legal right." *United States* v. *Pacific Railroad, supra,* at 239.

Although Congress had occasion to consider the problem of war claims early in our history, the widespread destruction during the Civil War brought the question to a sharp focus. The passage and veto in 1872 of a bill authorizing the payment of the claim of J. Milton Best, recounted by this Court in the *Pacific Railroad* case (120 U.S. 236–239), resulted in a comprehensive analysis of the general subject of war claims by the House Committee on War-Claims. In 1874, the Committee submitted an elaborate report, usually referred to as the Lawrence Report, H. Rept. 262, 43rd Cong., 1st Sess., as revised and enlarged, H. Rept. 134, 43rd Cong., 2d Sess., pp. 205–297. The considered judgment of the Committee, after a comprehensive study of the various categories of war claims, was that the Government is not liable "to make compensation for the property of a loyal citizen in a loyal State seized and destroyed or damaged by competent military authority—*flagrante bello*—to prevent it from falling into the hands of the enemy, as an element of strength where warlike operations are in progress or where the approach of the enemy is prospectively imminent." H. Rept. 134, *supra,* pp. 281–297.

With respect to the practice of Congress, the Lawrence Report declares that "notwithstanding anything elsewhere said, the right to compensation finds no sanction by the usage of the Government." (*Id.* at 294.) Turning first to the Revolutionary War, the Report points out that, although property was often destroyed to prevent it from falling into the hands of the enemy, Congress never made any provision for paying such claims nor did the States (*Id.* at 294).

Again, during the War of 1812 property was destroyed by the armed forces of the United States to prevent its capture by the enemy. Contrary to respondents' assertion that "the obligation to compensate under such circumstances was consistently recognized and discharged" (Br. in Opp., p. 18), the action taken by Congress with respect to those claims reveals no established usage or recognition of a legal obligation to pay just compensation. Although, as respondents show, some claims were recognized (Br. in Opp., p. 18), similar claims were denied. See *American State Papers, Class IX, Claims,* No. 243, p. 424; No. 587, p. 835; see also the statement of principles set forth in No. 536, pp. 752–753.

Significantly, although Congress did compensate some claimants, it made no general provision for paying for such losses. If, as respondents contend, compensation in the circumstances of the instant case was considered by Congress to be a legal obligation under the Fifth Amendment rather than a matter of bounty, it is hardly to be supposed that Congress would not have provided for payment in a general enactment. Congress did, in fact, provide generally for the payment of other categories of war losses. By the Act of April 9, 1816, 3 Stat. 261, Congress provided (Sec. 5):

> That where any property has been impressed, or taken by public authority, for the use or

> subsistence of the army, during the late war, and the same shall have been destroyed, lost, or consumed, the owner of such property shall be paid the value thereof, deducting therefrom the amount which has been paid, or may be claimed, for the use and risk for the same, while in the service aforesaid.

In addition, the Act further provided (Sec. 9):

> That any person who, in the time aforesaid, has sustained damage by the destruction of his or her house or building by the enemy, while the same was occupied as a military depositee, under the authority of an officer or agent of the United States, shall be allowed and paid the amount of such damage: *Provided,* It shall appear that such occupation was the cause of its destruction.

Subsequently, by the Act of March 3, 1817, 3 Stat. 397, Section 9 was limited to:

> houses or other buildings, occupied by an order of an officer or agent of the United States as a place of deposit for military or naval stores, or as barracks for the military forces of the United States.

The omission of any provision for payment of the category of losses here involved demonstrates, we believe, that Congress did not deem such losses to be legally compensable.[6]

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[6] Insofar as the Act provided compensation for houses destroyed by the enemy, it was said in 1818 by the House Committee on Claims to have been enacted as "a law originating in its benignity, and aimed gratuitously for the benefit of any suffering portion of the community." See *American State Papers, Class IX, Claims*, No. 412, p. 590. In this connection, it should be pointed out that one of the private bills relied upon by respondents—the claim of William H. Washington, 6 Stat. 151 (March, 1815)—was a case which came within the policy later adopted in Section 9 of the Act of April 9, 1816. The

Congressional disposition of the claims arising out of the Civil War further substantiates this conclusion. By the Act of July 4, 1864, 13 Stat 381, Congress provided compensation for the claims of loyal citizens in states not in rebellion for quartermaster's stores and subsistence actually furnished to the Army. However, Section 1 of that Act specifically provided:

> That the jurisdiction of the court of claims shall not extend to or include any claim against the United States growing out of the destruction or appropriation of, or damage to, property by the army or navy, or any part of the army or navy, engaged in the suppression of the rebellion, from the commencement to the close thereof.[7]

At the expiration of the Civil War, claims which had thus been excluded from the jurisdiction of the Court of Claims were presented to Congress for payment. Several bills providing compensation for losses sustained in circumstances similar to the present case were passed, but each was vetoed by the President. See Veto Messages of June 1, 1872, Sen. Ex. Doc. No. 85, 42nd Cong., 2nd Sess., for the relief of J. Milton Best; June 7, 1872, Sen. Ex. Doc. No. 86, 42nd Cong., 2nd Sess., for the relief of Thomas B. Wallace; January 29, 1873, Sen. Ex. Doc. No. 33, 42nd Cong., 3rd Sess., for the relief of East Tennessee University; February 12, 1873, Sen. Ex. Doc. No. 42, 42nd Cong.,

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Government had placed stores in Washington's house, and blew up the house to prevent the stores from being captured by the enemy. *American State Papers, Class IX, Claims*, No. 266, p. 446.

[7] This Act was enacted within a year after the decision of the Court of Claims in the *Grant* case. For the legislative history of the Act, see Cong. Globe, 38th Cong., 1st Sess., pp. 127, 164–168, 261, 282, 909–920, 924–926 (H. R. 66); Cong. Globe, 38th Cong., 1st Sess., pp. 1010, 2774, 2778, 2781, 3188, 3418–3420, 3499, 3513, 3544, 3587 (H. R. 305).

3rd Sess., for relief for the destruction of the Manchester, Ky., saltworks.

As this Court noted in the *Pacific Railroad* case, the claim of J. Milton Best focused attention on the issue and occasioned considerable debate. The history of the claim[8] is set forth in detail in the opinion in the *Pacific Railroad* case (120 U.S. at 236–239), and will not be repeated here.[9] We think it pertinent to add, however, that the principles there laid down by the President in his veto message (120 U.S. at 238) were even more forcefully reasserted in his veto of the bill for the relief of the proprietors and lessees of certain salt-works in Manchester, Kentucky (S. 161, 42nd Cong.). Their claim was for the value of the saltworks destroyed in October 1862, by the Union forces in the vicinity of Manchester. Having reason to believe that the Confederate authorities proposed to capture

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[8] Cong. Globe, 41st Cong., 2nd Sess., pp. 1947, 2986–2987 (S. 667), 4587, (H.R. 2240); S. Rep. No. 69, 41st Cong., 2nd Sess.; Cong. Globe, 41st Cong., 3rd Sess., pp. 62–63, 97–102, 165–169, 295–304, 311–319, 1934 (S. 667); Cong. Globe, 42nd Cong., 1st Sess., pp. 22, 84 (S. 105); Cong. Globe, 42nd Cong., 2d Sess., pp. 120, 2252–2253, 3148, 3621–3624, 3648, 3696, 4155–4156 (S. 105); S. Rep. No. 9, 42nd Cong., 2d Sess.; Sen. Rep. No. 412, 42nd Cong., 3d Sess.; Cong. Globe, 42nd Cong., 3rd Sess., pp. 1164, 1680 (S. 105); 2 Cong. Rec., pp. 10, 29, 1665 (43rd Cong., 1st Sess.).

[9] Contrast the disposition of the J. Milton Best claim with the claim of Josiah O. Armes, referred to by respondents (Br. in Opp., p. 18), for whose relief a private bill had been passed in 1867, 14 Stat. 617. Armes' house had been burned by Federal troops in Fairfax County, Va., to prevent its use by the enemy as a stronghold. See S. Rep. No. 112, 39th Cong., 2nd Sess. The award of compensation appears to have been an exception to the general rule, and a reward made in consideration of the fact that Armes and his wife had been of service to the Federal troops in giving information of the movement and situation of the Confederate forces. See Lawrence Report (H. Rep. No. 134, 43rd Cong., 2nd Sess.) p. 296, note 175.

and appropriate the large supply of salt on hand, the Federal commander had ordered his troops to destroy the salt-works. The loyalty of the claimants was unquestioned. See S. Rep. No. 50, 42nd Cong., 2nd Sess. In vetoing the bill, the President reiterated that the objections made by him to the bill for the relief of J. Milton Best applied with equal force to this bill, declaring that (Sen. Ex. Doc. No. 42, 42nd Cong., 3rd Sess., pp. 1–2):[10]

> I cannot agree that the owners of property destroyed under such circumstances are entitled to compensation therefore from the United States. Whatever other view may be taken of the subject, it is incontrovertible that these salt-works were destroyed by the Union Army while engaged in regular military operations, and that the sole object of their destruction was to weaken, cripple, or defeat the armies of the so-called southern confederacy.
>
> I am greatly apprehensive that the allowance of this claim could and would be construed into the recognition of a principle binding the United States to pay for all property which their military forces destroyed in the late war

[10] For the history of this claim, see Cong. Globe, 42d Cong., 2d Sess., pp. 1176, 2258, 2259, 2302, 3148 (S. 161); S. Rep. No. 50, 42d Cong., 2d Sess.; Cong. Globe, 42d Cong., 3d Sess., pp. 694–697, 722, 897, 919, 929, 930, 949, 1288, 1309; 4 Cong. Rec. 4364, 4467 (S. 969, 44th Cong., 1st Sess.); S. Rep. No. 444, 44th Cong., 1st Sess., Parts 1 and 2; 6 Cong. Rec. 58, 238 (H.R. 1025, 45th Cong., 1st Sess.); 13 Cong. Rec. 51 (47th Cong., 1st Sess.); S. Rep. No. 710, 47th Cong., 1st Sess.; 15 Cong. Rec. 11, 759 (S. 13, 48th Cong., 1st Sess.); S. Rep. No 99, 48th Cong., 1st Sess.; 17 Cong. Rec. 1033, 3176 (H.R. 4929, S. 2070, 49th Cong., 1st Sess.); 19 Cong. Rec. 32, 241 (S. 526, H.R. 2315, 50th Cong., 1st Sess.); 21 Cong. Rec. 111, 3413, 6326 (S. 610, H.R. 9407, 51st Cong., 1st Sess.); H. Rep. No. 2500, 51st Cong., 1st Sess.; 23 Cong. Rec. 26, 234 (S. 206, H.R. 2553, 52d Cong., 1st Sess.); 25 Cong. Rec. 329, 2184 (S. 436, H.R. 3699, 53d Cong., 1st Sess.).

for the Union. No liability by the Government to pay for property destroyed by the Union forces in conducting a battle or siege has yet been claimed; but the precedent proposed by this bill leads directly and strongly in that direction; for it is difficult upon any ground of reason or justice to distinguish between a case of that kind and the one under consideration. Had General Craft and his command destroyed the salt-works by shelling out the enemy found in their actual occupancy, the case would not have been different in principle from the one presented in this bill. What possible difference can it make in the rights of owners or the obligations of the Government, whether the destruction was in driving the enemy out, or in keeping them out, of the possession of the salt-works?

This bill does not present a case where private property is taken for public use, in any sense of the Constitution. It was not taken from the owners but from the enemy; and it was not then used by the Government, but destroyed. Its destruction was one of the casualties of war; and though not happening in actual conflict, was perhaps as disastrous to the rebels as would have been a victory in battle.

Owners of property destroyed to prevent the spread of a conflagration, as a general rule, are not entitled to compensation therefor; and for reasons equally strong, the necessary destruction of property found in the hands of the public enemy, and constituting a part of their military supplies, does not entitle the owner to indemnity from the Government for damages to him in that way.

The failure of Congress to take any further action on the J. Milton Best and salt-works claims evinces, we believe, congressional recognition and acceptance of the principles of liability announced by the President. The establishment of those principles is further shown by the history of the bill for the relief of East

Tennessee University subsequent to its veto by the President (S. 490, 42nd Cong.; veto message of January 29, 1873, Sen. Ex. Doc. No. 33, 42nd Cong., 3rd Sess.). The University's claim was not for the destruction of property to deny its use to the enemy, but for the damage and destruction which occurred while the property was being used by Federal troops—a claim similar to that of the University of Kentucky, for whose relief a private bill had earlier been enacted on January 17, 1871 (16 Stat. 678). The bill was vetoed by the President because its phrasing made it appear to be a claim for destruction similar to that of J. Milton Best. With the approval of the President, the phrasing of the bill was changed and the bill was subsequently enacted in the succeeding Congress. (S. 110, 43rd Cong.; Act of June 22, 1874, 18 Stat. 604). The congressional discussion of the revised bill reveals quite clearly the acquiescence of Congress in the principles enunciated in the denial of the claim of J. Milton Best. See 2 Cong. Rec. 1317–1319, 5200–5201 (43rd Cong., 1st Sess.).

The usage thus established has apparently continued to this date. As previously noted, *supra*, pp. 42–43, Congress, in 1864, had withdrawn jurisdiction of such claims from the Court of Claims. By the Act of March 3, 1883, 22 Stat. 485, Congress again provided that (Sec. 3):[11]

> The jurisdiction of said court shall not extend to or include any claim against the United States growing out of the destruction or damage to property by the Army or Navy during the war for the suppression of the rebellion, or for the use and occupation of real estate by any part of the military or naval forces of the

[11] For the legislative history of this Act, see 13 Cong. Rec. 3147–3167, 3184–3206; 14 Cong. Rec. 908–912, 946–953, 3660, 3672–3673.

> United States in the operations of said forces during the said war at the seat of war; nor shall the said court have jurisdiction of any claim against the United States which is now barred by virtue of the provisions of any law of the United States.

Again, Civil War claims which had thus been excluded from the jurisdiction of the Court of Claims were presented to Congress for payment. Adhering to the principles established in the denial of the claims of J. Milton Best and the Manchester, Ky., salt-works, Congress reiterated that "the practice and usage of Government during and since the late civil war is a denial of liability for this class of claims." (S. Rept. 22, 48th Cong., 1st Sess., p. 8). In justification of its position, the Senate Committee on Claims relied in part, as we have, upon the conflagration cases, declaring that (S. Rept. 40, 48th Cong., 1st Sess., p. 2):

> There are two classes of cases in which Government, for public ends, deprives the citizen of his property either in war or peace. One is the exertion of the right of eminent domain by which property is taken for public use. This may be for a military use as well as for a peaceful one, as to build a fort or ship, or supply an army. It is, under our Government, exerted by the legislative authority, either directly or by delegation. The other is the right of necessity, where property is used or destroyed to avert an imminent danger, or supply an immediate and pressing necessity of such a character that private interests must yield to it. Of this class are the destruction of dwellings to prevent the spread of a fire, the building of bulwarks on private ground, the entering houses to prevent felonies or arrest offenders, and the like. We think the error of those persons who insist on the obligation of Government to make compensation in cases like the present, is in placing them in the first of these

> divisions. They seem to us to belong to the second. The conflagration of Moscow, the laying Holland under water by destroying the dikes, the destruction of Athens when her people took to their ships, were not process of law or exercise of the right of eminent domain. They were the acts of self-defense of nations in a death struggle, justified only by that overwhelming necessity of self-preservation which for the time being exonerates individuals and nations from all legal restraint whatever.

The right to compensation was again denied by Congress after the Spanish-American War with respect to the claim of William Hardman. Hardman, a British subject, was employed by the Juragua Iron Company and occupied one of its houses in Cuba. His claim * * * was for household goods and clothing destroyed by United States military authorities during that war to prevent an epidemic of yellow fever. Anticipating this Court's decision in the *Juragua* case, the Senate Committee on Foreign Relations declared that, "The United States Army had a right to destroy this property, without making compensation to the owners. They had a right to destroy it as an act of war, and they had a right to destroy it in order to prevent an epidemic of yellow fever." (S. Rept. 224, 57th Cong., 1st Sess., p. 2).

More recently, the doctrine of non-liability was adopted in the Federal Tort Claims Act of 1946, which excludes from the coverage of the Act "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. 2680. To the same effect, see the Military Claims Act (31 U.S.C. 223b) and the Foreign Claims Act (31 U.S.C. 224d).

Where Congress has authorized the payment of compensation for the destruction of, or damage to, property resulting from action taken by the armed

forces of the United States to deny the enemy the use of such property, it has done so as a matter of grace and as part of a broad comprehensive scheme for rehabilitation. Thus, the Philippine Rehabilitation Act of 1946 (60 Stat. 128, 50 U.S.C. App. 1751, *et seq.*)[12] not only authorized payment for the losses resulting from "action taken by or at the request of the military, naval, or air forces of the United States to prevent such property from coming into the possession of the enemy" but also for concededly non-compensable losses resulting from "enemy attack," "action taken by enemy representatives, civil or military, or by the representatives of any government cooperating with the enemy," and "looting, pillage, or other lawlessness or disorder accompanying the collapse of civil authority." (Sec. 102(a), 50 U.S.C. App. 1752(a).) That compensation under this Act is a matter of grace, rather than of constitutional right, is further demonstrated by the proviso of Section 102(a) that, "in case the aggregate amount of the claims which would be payable to any one claimant under the foregoing provisions exceeds $500, the aggregate amount of the claims approved in favor of such claimant shall be reduced by 25 percentum of the excess over $500." (50 U.S.C. App. 1752(a).) See also H. Rep. No. 1921, 79th Cong., 2d Sess., p. 9; Schein, *War Damage Compensation Through Rehabilitation: The Philippine War Damage Commission,* 16 Law & Contemp. Prob. 519.[13]

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[12] For the legislative history of the Act, see S. Rep. No. 755, 79th Cong., 1st Sess.; H. Rep. Nos. 1921, 1957, 79th Cong., 2d Sess.; 91 Cong. Rec. 10788, 10828, 11036, 11463, 11470; 92 Cong. Rec. 3392, 3435–3450, 3676, 3773, 3987, 4038.

[13] The exclusion of the respondent Shell Company from the coverage of the Act, because it is a British corporation (50 U.S.C. App. 1752(b)(4); see Br. in Opp., p. 25), underscores the fact that compensation was not provided in discharge of any constitutional obligation. It is well-settled that friendly alien corporations are protected by the Fifth Amendment. *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481.

The approach adopted by Congress of providing broadly for the compensation of war claims as a humanitarian rehabilitation measure—a measure similar to those adopted by Great Britain and several European countries [14]—suggests a basic fault of the decision below. The widespread "scorched earth" tactics of modern warfare make the payment of full compensation, as a matter of right, a financial impossibility. For economic, as well as humanitarian, reasons, the damages caused by both enemy and friendly forces must be repaired. But the extent of their repair necessarily rests upon the financial strength of the nation at the close of hostilities. If rehabilitation is to be effective, it must be based on considerations of policy which are applicable generally to the nation as a whole rather than on principles of absolute legal liability. The determination of those considerations, we submit, lies with Congress and not with the courts.[15]

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[14] See Robinson, *War Damage Compensation and Restitution in Foreign Countries*, 16 Law & Contemp. Prob. 347; Brooks, *A Survey of Progress Towards Payment of War Damage Compensation in Europe*, 1 Int'l L.Q. 301; Fraleigh, *Compensation for War Damage to American Property in Allied Countries*, 41 Am. J. Int'l L. 748.

[15] Cf. War Damage Insurance Act of 1942, 56 Stat. 174, 15 U.S.C. 606b–2; Marine War Risk Insurance Acts (Act of June 29, 1936, 49 Stat. 1505, as amended, 54 Stat. 689, 56 Stat. 140, 56 Stat. 214, 57 Stat. 47, 58 Stat. 216) 46 U.S.C. 1128–1128h; Sec. 17 of Contract Settlement Act of 1944, 58 Stat. 649, 41 U.S.C. 117; Lucas Act of 1946, 60 Stat. 902, 41 U.S.C. 106 note; see also Sec. 8 of the War Claims Act of July 3, 1948, 62 Stat. 1245, 50 U.S.C. App., Supp. V, 2007; Report of War Claims Commission, H. Doc. No. 580, 81st Cong., 2d Sess.; S.J. Res. 171, 82d Cong., 2d Sess.; Cong. Rec., July 5, 1952, pp. 9588–9591.

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